



Natural Resources Conservation Service
P.O. Box 2890
Washington, D.C. 20013

April 1, 2003

SUBJECT: PER - Ethics – Proposed Changes in Post-Employment Regulations

TO: Deputy Chiefs
Regional Conservationists

File Code: 360-16-11

By memorandum dated March 12, 2003 (copy attached), we informed you of the opportunity to submit comments on proposed changes in the ethics regulations on post-employment restrictions. That memorandum, including attached proposed regulations, was transmitted to you via email. This provides a summary of the nature of the proposed rule to assist you and your staffs in understanding what has and has not changed, and what that likely means to NRCS employees. This also points out key aspects of the proposed rule to assist with identification of provisions that may be of personal interest to reviewers.

The post-employment restrictions (except those affecting procurement officials) are at 18 USC 207, and currently promulgated in Title 5 of the Code of Federal Regulations (CFR) Part 2637. The changes are being proposed as a *new* 5 CFR Part 2641 which, when finalized, will replace and revoke the *old* Part 2637. The Office of Government Ethics (OGE) has determined that it is necessary to issue the proposed rule as a substitution versus a revision of the CFR. However, the statute itself that contains the post-employment restrictions is not being changed so, in large measure, the rules are the same.

In practical terms, the proposed rule is less about change than providing a codified single document that effectively incorporates previously issued interpretive OGE regulations, advisory opinions, and written and oral guidance. It also incorporates previously issued opinions of the Office of Legal Counsel (OLC), Department of Justice. Advice and guidance on specific situations provided over the years by ethics advisors at all levels should have been based on the body of previously issued OGE and OLC guidance interpreting the statutory post-employment restrictions, regardless of the venue in which that guidance was issued. The proposed Part 2641 will serve as a single source for communicating the body of determinations and guidance and, therefore, make it easier for employees and advisors to research how the statutory provisions apply in specific situations.

Nevertheless, there are some changes and still other areas may seem to have changed as employees gain an increased understanding of the prohibitions from the improved, detailed guidance.

Impact of the Proposed Rule on NRCS Employees

A major effect of the proposed rule, when finalized, will be to codify and, thereby, more clearly and effectively communicate *to all employees in a single issuance*, previously issued interpretive

regulations, advice, and guidance explaining the post-employment restrictions. This will incorporate provisions from various OGE and/or the OLC issued memoranda to agency ethics officials, written advisory opinions and oral advice, as well as court cases. For example, it includes discussions of certain key statutory concepts such as “personal and substantial participation” and “particular matter involving specific parties.” Included are provisions from previously issued interim regulations providing limited relief from the one-year cooling-off restrictions for senior employees (see 18 USC 207(c)). It also adds guidance to more clearly explain all of the substantive prohibitions on post employment, as well as all of the exemptions and exceptions in the statute that are applicable to executive branch employees.

Since the proposed rules mainly pull together OGE guidance previously issued in a variety of venues, we would not expect that the proposed rules will significantly affect previously issued ethics opinions from this office.

Given the detail, depth and complexity of the specific guidance in the proposed rule, we believe it will have a second affect. That is, to make it highly unlikely that a former employee will be able to make a credible argument that he or she did not understand that certain activities would constitute a post-employment violation. This should encourage renewed interest to understand basic post-employment restrictions on the part of retirees, and NRCS employees considering retirement. This should also lead management to be more vigilant in efforts to provide effective ethics counseling to retiring employees. In this regard, it is interesting to note that the Secretary’s February 28, 2003, Memorandum to Agency Heads, directs that:

“...all financial disclosure report filers who are considering leaving the Federal government in CY 2003, as well as any other USDA employees who wish to do so, must meet with their ethics advisors to assure full understanding of the rules governing the process of seeking outside employment and Federal post-employment restrictions.”

A roadmap to assist in your review of the specific restrictions that are undergoing change is provided below.

Structure of the Proposed Rule

Subpart A of the proposed rule includes general provisions, including definitions of terms used. Clarification is provided in several areas. For example, the proposed section clarifies that persons appointed or detailed under the Intergovernmental Personnel Act (IPA) are subject to the post-employment restrictions upon leaving Government service. It also clarifies when service ends in the case of “special Government employees” (SGE).¹ Although stated as a “change,” the proposed language which defines “senior” employee, based on a rate of basic pay at or above level 5 of the Senior Executive Service (ES-5), is consistent with current regulations and, in practical terms, represents no substantive change.

¹ “A SGE is an employee who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis”

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We recommend that NRCS employees reviewing the proposed rule focus on Section B.² Section B includes six separate sections outlining the key elements of each of the substantive post-employment restrictions. Each section includes: (a) a statement of the statutory prohibition; (b) a list of statutory exceptions or waivers applicable to that particular prohibition; (c) an explanation of the duration of the prohibition; and (d) a list of the elements of the prohibition, with appropriate guidance concerning the correct interpretation of each element.

The following outline of Section B is provided so that you can quickly reference any restriction that is of special interest to you.

Lifetime Ban Applicable to All Employees

The proposed section 2641.201 (page 65) concerns the lifetime ban on representation in connection with particular matters involving specific parties in which a former employee participated personally and substantially. [18 USC § 207(a)(1)] This restriction:

Prohibits a former employee from communicating to or appearing before an employee of the Federal Government in connection with particular matters involving specific parties in which a former employee participated personally and substantially and the United States is a party or has a direct and substantial interest.

The proposed section, which parallels previous guidance on this restriction, includes a number of changes and new examples to clarify the scope of the restriction and reflect changes in the statutory language and more recent opinions of OGE, OLC and the courts. The proposed rule clearly communicates that, a violation of this provision occurs if and when:

1. A former employee contacts a current employee; and
2. That contact is on behalf of another; and
3. That contact was with the intent to influence the current employee or Agency (or appeared to be with the intent to influence); and
4. That contact was with respect to a particular matter involving specific parties; and
5. The former employee was personally and substantively involved with that same particular matter involving specific parties while still employed with NRCS; and
6. The United States is a party or has a direct and substantial interest in that matter.

Two-year Ban Applicable to Matters Under An Employee's Area of Responsibility

The proposed section 2641.202 (page 79) concerns the two-year ban on representation to the Government in connection with a particular matter involving specific parties which was pending

² To locate the beginning of Section B, see page 65 of the proposed regulation, if printing, use size 12 font, or page 7872 of 68 Federal Register (FR) issued 02/18/2003.

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under a former employee's official responsibility during the last year of his Government service [18 USC § 207(a)(2)]. It provides that:

For two years after Government service terminates, no former employee shall knowingly, with the intent to influence, make any communication to or appearance before an employee of the United States on behalf of another person in connection with a particular matter involving a specific party or parties, in which the United States is a party or has a direct and substantial interest, and which the former employee knows or reasonably should know was actually pending under his/her official responsibility within his/her last year of Federal service. This restriction applies irrespective of whether the former employee personally participated in the matter as a Federal employee.

This proposed section parallels previous guidance on this restriction. However, it includes a number of changes, including new examples, to clarify the scope of the restriction and to reflect statutory and more recent opinions. The proposed rule clearly communicates that, a violation of this provision occurs if and when:

1. Within two years of the date Government service terminates;
2. A former employee contacts a current employee; and
3. That contact is on behalf of another; and
4. That contact was with the intent to influence the current employee or Agency (or appeared to be with the intent to influence); and
5. That contact was with respect to a particular matter involving specific parties; and
6. The United States is a party or has a direct and substantial interest in that matter; and
7. The employee knew or reasonably should have known that the same matter was actually pending under his/her area of responsibility during the last year of Federal employment.

The proposed section 2641.203, dealing with restrictions in connection with trade agreements or treaty negotiations, is unlikely to be relevant to NRCS employees.

The One-Year Cooling-off Period for Certain “Senior” Employees

The proposed section 2641.204 (p. 84) sets forth the elements of the one-year cooling-off restriction applicable to former senior employees [18 USC § 207(c)]. An NRCS employee in a position for which the rate of pay is in, or fixed according to, the Executive Schedule, and for which the rate of basic pay is equal to or greater than the basic pay payable for level 5 of the Senior Executive Service (exclusive of locality pay, bonuses, awards, etc.) is a “senior” employee. This restriction prohibits a former “senior” NRCS employee from communicating to or appearing before an employee of USDA, on behalf of another person, with the intent to influence official action. This restriction applies regardless of prior involvement or the lack of prior involvement in the matter.

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The proposed section parallels existing guidance on this prohibition. However, the proposed rule would remove the prior ban on self-representation. It also clarifies that the “one-year cooling off” period starts when an employee leaves from a “senior” position. This may or may not coincide with them actually leaving Federal service.

The proposed section 2641.204(c)(1) concerns the application of 18 USC 207(c) to special Government employees (SGEs) who have served 60 days or more. This section should be of special interest to SGE’s and the ethics advisors for SGE’s. For example, it codifies previously issued less formal guidance on how the 60 days should be computed. The proposed section 2641.204(c)(1) also addresses the manner in which an SGE's rate of basic pay should be calculated for purposes of determining whether the SGE is a “senior” employee.

The proposed section 2641.205 is not applicable to NRCS employees. [It deals with the restrictions applicable to very senior employees pursuant to 18 USC 207(d). NRCS does not have any very senior employees for ethics purposes.]

Exceptions and Waivers

Section 2641.301 (p. 93) of the proposed rule addresses the various provisions for obtaining an exception or waiver to the post-employment restrictions. These are currently effective in that they are in the current statute, but this section proposes numerous important changes to those statutory provisions, as well as the addition of new exceptions or exemption provisions. Proposed exceptions or provisions for requesting a waiver that might be of particular interest to certain NRCS employees include, for example:

1. Provision relative to a former senior employee making a communication or appearance on behalf of a state or local government provided the communication or appearance is made in carrying out official duties as an employee on behalf of that state or local government entity. [See 2641.301(c) (page 96).]
2. Provision relative to a former senior employee making an uncompensated statement based on special knowledge concerning a subject area if he/she is familiar with the subject area as a result of education, interaction with experts, or other unique or particularized experience, based on facts directly observed by the former senior employee. [See 2641.301(d) (page 97).]
3. Provision relative to an employee making communications, including appearances solely for the purpose of furnishing scientific or technological information, such as technical or engineering information relating to the natural sciences. [See 2641.301(e) (page 97).]

The proposed rule includes significant and substantial criteria for their use. A Deputy Chief, or other reviewer interested in one of these or another proposed exception, is encouraged to review the proposed criteria for its use and provide appropriate comments and/or concerns. Reviewers

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should note, for example, the criteria for using the proposed exception for providing certain technical or engineering information relating to the natural sciences (see item 3, above). These include that the agency to which the technical information is to be provided, have adopted procedures for certifying a former employee as having expertise in a technical discipline. The proposed rule would require that, to be adopted by an agency, those procedures be published in the Federal Register after consultation with the Director, OGE.

Appendices A and B (page 112) are not relevant to NRCS, but you may be interested to know the impact of this on NRCS senior employees. They address the various departmental components that OGE has determined are “separate” agencies for purposes of the post-employment restrictions on former senior employees. These designations define the “agency” and, therefore, the extent of the one-year ban on contacts by former senior employees with employees of their former “agency.” (See *The One-Year Cooling-Off Period for Certain “Senior” Employees*, above.) No departmental components have been designated for USDA because the Office of the General Counsel has been persuasive in opposing any such request for USDA. Accordingly, the representational ban on contacts to current employees by former NRCS senior employees during the one-year cooling-off period prohibits covered communication to any current employee of any USDA agency, versus just NRCS.

The due date for comments remains April 28, 2003. If you have questions, please contact Caryl J. Butcher, Agency Ethics Advisor, at (301) 504-2197 or via email at caryl.butcher@usda.gov.

/s/

P. DWIGHT HOLMAN
Deputy Chief for Management

Attachment

cc:
State Conservationists
Directors, Caribbean and Pacific Basin Areas
Directors, Centers and Institutes
Regional and State Administrative Officers
NHQ Division Directors and Above

FINAL:NRCS:MGT/Ethics/More on proposed post employment rule:cb:dhb/504-2197:3-27-03